IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 76-40[illegible]

INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA, *Respondent*

v.

THOMAS S. KLEPPE, SECRETARY OF THE INTERIOR, *Respondent*

BITUMINOUS COAL OPERATORS' ASSOCIATION, INC. and ZEIGLER COAL COMPANY, *Petitioners*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioners, Bituminous Coal Operators' Association, Inc., and Zeigler Coal Company, respectfully pray that a Writ of Certiorari issue to review the decision and judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on April 13, 1976.

OPINIONS BELOW

The decision of the Court of Appeals is not yet officially reported and is reproduced at pages 1a-9a of the

Appendix hereto. The Order of the Court of Appeals denying a petition for rehearing on May 6, 1976, is reproduced at page 10a of the Appendix. The decision of the Interior Department's Board of Mine Operations Appeals which was reversed by the Court of Appeals is reproduced at pages 11a-30a of the Appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on April 13, 1976, and the Order of the Court of Appeals denying a petition for rehearing was issued on May 6, 1976. This Petition for Certiorari was filed within ninety (90) days of the judgment. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals erroneously construed Section 104(c)(1) of the Federal Coal Mine Health and Safety Act, 30 U.S.C. 814(c)(1), as authorizing federal inspectors to summarily order the immediate closure of coal mines without any opportunity for a prior hearing on the basis of an alleged violation of a regulation which admittedly does not pose any immediate threat to the safety or health of the coal miners.

2. Whether Section 104(c)(1) of the Federal Coal Mine Health and Safety Act, 30 U.S.C. 814 (c)(1), as so construed by the Court of Appeals, is unconstitutional.

STATUTES INVOLVED

The statute involved is the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801, et seq,

Sections 104, 105, 106 and 109 of which are reproduced at pages 31a-42a of the Appendix.

STATEMENT OF THE CASE

This case arose under Section 104(c)(1) of the Federal Coal Mine Health and Safety Act. This section, as we will explain, is only a part of a complex scheme of regulation which vests a variety of powers in federal coal mine inspectors to issue orders to abate conditions, to fix the time for abatement, and to close all or part of a coal mine on their own authority.

This case involves a question of the federal coal mine inspector's power to close down a coal mine where he finds that a health or safety standard was violated, even though it is admitted that the violation was not serious and did not pose any imminent danger or even substantial hazard to the miners. The predicate for such a closure order is derived from Section 104(c)(1). The section provides, in effect, that where a coal mine inspector once finds one violation of a standard which does not pose an imminent danger, but could substantially contribute to a safety or health hazard, and also finds that this particular violation was due to an "unwarranted failure" on the part of the mine operator, a second unwarrantable violation of a standard within 90 days shall automatically cause the closure of the mine. The term "unwarrantable failure" is not statutorily defined.

The question presented in this case is whether the second violation must be serious enough to pose a significant and substantial hazard to the health or safety of the miner; or, stated in more direct terms, whether a mine inspector can close down a coal mine

because of his own belief that some standard has been violated, even though it is admitted that no imminent danger exists and that there is no substantial or immediate hazard.

The facts in this particular case are as follows:

On April 28, 1972, during an inspection of Zeigler Mine No. 4 in Illinois, a federal mine inspector cited the mine operator for a violation of a safety standard prohibiting the accumulation of loose coal and coal dust. No hearing of any kind was held. The inspector also noted on the citation that the violation was due to an "unwarrantable failure".

Three weeks later, a federal mine inspector in the same mine detected what he thought was another violation of a standard and invoked Section 104(c)(1) to shut down a part of the mine. He did so on the basis of his individual opinion that the "violation" was due to "unwarrantable failure". The alleged violation did not pose any immedaite or substantial threat to the health and safety of the miners.

This finding was appealed by Zeigler. On appeal, the Board of Mine Operations Appeals had to determine the question of whether or not a closure order could be issued under Section 104(c)(1), even though the violation in question was one which did not pose either an "imminent danger" or even a hazard to the miners. It was conceded that the accumulation of loose coal and dust in this particular case posed no danger or hazard.

Decision of Board of Mine Operations Appeals

The Board, after hearing, reversed the action of the mine inspector. The Board found that, under the

statutory scheme, Congress did not intend to allow a coal mine inspector to close down all or part of a mine unless there was (1) an imminent danger to the health or safety of the miners, or (2) in an "unwarrantable failure" situation, at least a violation of such degree of seriousness as to contribute to the cause and effect of a mine health or safety hazard. The Board specifically found that the May 11 violation resulting in the closure order "did not pose a probable risk of serious bodily harm or death." Accordingly, the closure order was invalidated. Nonetheless, the mine had been shut down for a substantial period of time (13 hours) before the mine inspector permitted it to be reopened. The coal operator was not recompensed for his production and other losses.

On reconsideration, the Board reaffirmed its findings, and the case was appealed by the United Mine Workers of America (UMWA) to the Court of Appeals for the District of Columbia Circuit.

The decision of the Interior Board of Appeals was specifically as follows:

That the validity of a closure order under Section 104(c)(1) rests upon (1) proof of a violation of a mandatory health or safety standard; (2) absence of an imminent danger; (3) the presence of a significant and substantial contribution to the cause and effect of a mine safety or health standard; and (4) an "unwarrantable failure" on the part of the mine operator to comply with the standard.

The Board, as stated, rejected the contention that a closure order could be issued on the basis of an *ex parte* "finding" by a coal mine inspector of *any* standard, regardless of the existence of any hazard,

simply because the mine inspector believed that the failure of the mine operator to observe the standard was "unwarrantable", a term which obviously has no precise meaning and is subject to varying interpretations. The Board found that any other interpretation of Section 104(c)(1) would conflict with clear Congressional intent and would add an unintended punitive element which would be duplicative of other criminal sanctions applicable to willful violations.

The Decision Of The Court Below

On appeal by the United Mine Workers, which represents the miners employed by Zeigler, the Court of Appeals reversed, holding that the clear statutory language as well as the legislative history "makes it abundantly clear that any unwarranted violation of a mandatory health or safety standard is sufficient to justify issuance of a Section 104(c)(1) withdrawal order", even though the violation did not significantly and substantially contribute to a mine hazard.

In so construing the provisions of Section 104(c)(1), the Court ignored without discussion Petitioners' argument that the Board's construction "avoids the serious constitutional issues which otherwise would emerge, in the event *ex parte* closure orders were issued based on violations which pose no substantial health or safety hazard to the miners."

The Act's Enforcement Scheme

Before proceeding to the reasons for granting the Writ, a brief description of the overall procedures for the enforcement of the mandatory health and safety standards of the Act is appropriate.

In addition to the assessment of substantial civil[1] and criminal[2] penalties against coal mine operators and certain individuals for mine safety violations, the Federal Coal Mine Health and Safety Act contains a number of provisions authorizing a federal inspector to summarily order the closing of all or part of a coal mine, without affording the mine operator a prior opportunity to be heard:

(a) The mine inspector is mandated to issue a closure order where he finds the existence of an "imminent danger". Section 104(a). The term "imminent danger" is defined as "the existence of any condition or practices in a coal mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated." Section 3(j). This is regardless of fault.

(b) The mine inspector is mandated to issue a closure order where he finds that the mine operator has failed to correct a claimed violation, whether serious or non-serious, within the time unilaterally fixed by the federal mine inspector. Section 104(b).

(c) The mine inspector is mandated to issue a closure order where he finds a violation to have been caused by an "unwarrantable failure" on the part of the mine operator. Section 104(c). This provision,

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[1] Section 109(a) provides for a mandatory civil penalty of up to $10,000 per violation, and subsection (c) provides for a like penalty against corporate officers, directors and agents (including foremen) who "knowingly" commit a violation. *NICOA* v. *Kleppe*, —— U.S. ——, 96 S.Ct. 809 (1976).

[2] Sections 109 (b) and (c) provide for imprisonment and fines up to $50,000 for willful violations by mine operators or corporate officers, directors and agents (including foremen).

whose correct interpretation is at issue here, is discussed in detail below.

(d) Subsequent to the issuance of a mine closure order, the mine operator may seek administrative review thereof, Section 105, by filing a written application with the Interior Department Office of Hearings and Appeals in Arlington, Virginia. 43 C.F.R. 4.508. The filing of the application for review does not operate as a stay of the order, Section 105(a)(1), and temporary relief from "unwarrantable failure" orders or "failure-to-abate" orders may be granted only following a hearing, Section 105(d). No temporary relief can be granted for an "imminent danger" closure. Hearings to review such orders are to be conducted pursuant to the Administrative Procedures Act and on at least five days notice to the parties, including the labor organization representing the miners, Section 105(a)(2).

The "Unwarrantable Failure" Procedures

Section 104(c) consists of three separate, but related, enforcement procedures. The first, embodied in the initial sentence of subsection (c)(1), provides for a written finding to be included in a notice of violation, in the event a mine inspector determines (a) that the cited violation "is of such a nature as could significantly and susbtantially contribute to the cause and effect of a mine safety or health hazard", (b) that the violation resulted from the mine operator's "unwarrantable failure . . . to comply" with the standard, and (c) that the violation did not cause "imminent danger."

The first procedure triggers the second procedure, which is embodied in the second sentence of subsection (c)(1)—the virtually automatic issuance of a mine closure order—if the inspector, during any subsequent inspection within 90 days, "finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply. . . ."

The third procedure, set forth in subsection (c)(2), is triggered by the issuance of a (c)(1) closure order. This procedure directs the issuance of a mine closure order for all subsequent violations "similar to those that resulted in the issuance of the withdrawal order [under subsection (c)(1)] until such time as an inspection of such mine discloses no similar violations. . . ."

REASONS FOR GRANTING THE WRIT

The Court of Appeals, In Construing § 104(c) As Authorizing Summary Mine Closures Without Pre-closure Opportunities To Be Heard, Has Decided An Important Federal Question In Conflict With Applicable Decisiois Of This Court.

In rejecting the decision of the Interior Board of Mine Operations Appeals and substituting its own construction which would empower federal inspectors to close mines on the basis of *any* unwarranted violation, however insignificant the hazard, the Court of Appeals disregarded decisions of this Court which direct that, when possible, statutory provisions are to be construed so as to avoid serious constitutional issues. The decision of the Court below, if adopted as the correct interpretation of Congressional intent, raises serious constitutional issues which the Court below did not consider.

In *United States* v. *Delaware & Hudson Company*, 213 U.S. 366, 29 S.Ct. 527 (1909), this Court charac-

terized as "elementary" the principle of statutory construction that:

> ". . . where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided our duty is to adopt the latter." 29 S.Ct. 536.

As more recently restated in *United States* v. *Thirty-seven Photographs,* 402 U.S. 363, 369, 91 S.Ct. 1400, 1404 (1971):

> "'. . . it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided.' Crowell v. Bension, 285 U.S. 22, 62 (1932)."

Accord, e.g., *United States* v. *Vuitch,* 402 U.S. 62, 70, 91 S.Ct. 1294, 1298 (1974).

The effect of the decision of the Court of Appeals is to unnecessarily enshroud § 104(c) with "grave and doubtful" questions as to its constitutionality, for the Court's construction would authorize the immediate and summary closure of all or part of a coal mine when a federal mine inspector, during the same or a subsequent inspection within ninety (90) days, deems *any* violation to have been "unwarranted", regardless of the presence or absence of a safety hazard to the miners.

Earlier this term in *Mathews* v. *Eldridge,* —— U.S. ——, 96 S.Ct. 893 (1976), a case involving termination of social security disability benefits, this Court had occasion to reexamine its earlier decisions in such cases as *Sniadach* v. *Family Finance Corp.,* 395 U.S. 337, 89 S.Ct. 1820 (1969); *Goldberg* v. *Kelly,* 397 U.S.

254, 90 S.Ct. 1011 (1970); *Fuentes* v. *Shevin,* 407 U.S. 67, 92 S.Ct. 1983 (1972); *Calero-Toledo* v. *Pearson Yacht Leasing Co.,* 416 U.S. 663, 94 S.Ct. 2080 (1970); and *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.,* 419 U.S. 601, 95 S.Ct. 719 (1975).

The "specific dictates of due process", the Court stated in *Mathews,* require consideration of the fairness and reliability of the pre-deprivation procedures available in the specific case. 96 S.Ct. at 903. In *Mathews,* there was available an administrative procedure involving notice of the proposed governmental action, an oportunity to reply and multiple-layered decision-making. In stark contrast Section 104(c)(1) of the Federal Coal Mine Health and Safety Act establishes no pre-closure procedure whatever. The issuance of the closure order by the federal inspector is both automatic and summary; it is preceded only by the inspector's on-site *ad hoc* determination that a violation has occurred due to the operator's "unwarranted" conduct. There is not even a requirement for concurrence in the issuance of the order by a supervisory inspector, district manager or assistant administrator; there is no notice of intent to issue the order and no opportunity to submit exculpatory or explanatory material; and there is no opportunity to avoid or recoup the economic losses resulting from the immediate closure of the mine.[8]

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[8] In addition to production losses, § 110(a) of the Act obligates the mine operator to compensate miners idled by closure orders issued under § 104 by federal mine inspectors, even where such closure orders subsequently are vacated by the Department or invalidated on appeal. *Rushton Mining Co.* v. *Morton,* 520 F.2d 716 (C.A. 3, 1975); *CF&I Steel Corp.* v. *Morton,* 516 F.2d 868 (C.A. 10, 1975).

Nor does § 104(c)(1) as interpreted by the Court of Appeals, fall within the "truly unusual" and "extraordinary" situations in which this Court has "allowed outright seizure without opportunity for a prior hearing". *Fuentes* v. *Shevin,* 407 U.S. at 90. None of the three criteria established by this Court to define the narrow exception are met in the case of § 104(c) closure orders, as that provision now is construed by the Court of Appeals.

First, the mine closure is not necessary to secure the admittedly important Governmental and public interest in the health and safety of the Nation's coal miners. Inasmuch as 104(c)(1), as interpreted, does not involve imminently dangerous conditions and need not involve violations which pose a threat of bodily harm, the availability of substantial civil and criminal sanctions renders a summary mine closure under these circumstances totally unnecessary to protect the health and safety of the miners.

Second, in the case of § 104(c)(1) orders, there is no special need for "very prompt action" because the miners are not exposed to an imminent danger or even to a real hazard of any degree. Where such an imminent danger is detected, § 104(a) authorizes the immediate withdrawal of the miners, irrespective of the existence of a violation or operator culpability.[4] In the absence of an imminent danger or a substantial hazard, however, there is no need for immediate issu-

[4] Additionally, coal miners employed under the National Bituminous Coal Wage Agreement need not await the arrival of a federal mine inspector, but may themselves cease work under imminently dangerous conditions. See *Gateway Coal Co.* v. *United Mine Workers,* 414 U.S. 368 (1974).

ance of a mine closure order, and no justification for depriving the mine operator of an opportunity to be heard prior to inflicting upon him the ultimate injury of uncompensated closure of his mine.

Third, the authority to summarily close coal mines is dispersed among the Secretary's 1300 coal mine inspectors, whose determinations of "violation", "unwarrantable failure" and "significantly and substantially contribute" are purely subjective and unreviewable except administratively and *ex post facto*. These subsequent review procedures are cumbersome and time consuming and of no practical significance. Even if the mine operator wins, he gains no recompense for the losses he sustained as a result of the mine closure. Moreover, the Act provides criminal sanctions for refusing to obey closure orders. Section 109(b). Thus, the risk of an erroneous deprivation, for which the mine operator is entitled to no recompense, is so enormous as to make the use of summary closure procedures in all but hazardous situations wholly unwarranted.

On the other hand, the Department's construction reduces significantly the gravity of the constitutional issue surrounding the summary mine closure procedures of § 104(c)(1), by limiting its application to unwarranted violations which pose real safety hazards to the miners. Under its interpretation, non-hazardous violations would be enforced under § 104(b) by the immediate issuance of a "notice of violation" with directions to abate within a time span determined by the mine inspector. Yet this interpretation by the Department of the "unwarrantable failure" provision, which has existed in substantially identical form

in coal mine safety legislation since 1966,[5] was afforded none of the "great deference" to which this Court has held such administrative interpretations are entitled. *Udall* v. *Tallman,* 380 U.S. 1, 16 (1965). Indeed, nowhere is the wisdom of such a rule calling for judicial restraint in cases of statutory construction better demonstrated than here, where the "unwarrantable failure" provision is but one of many complex, interrelated and intertwined enforcement provisions incorporated in Title I of the Act. The Department's decision harmonizes the provisions of § 104(c) with not only the other mine closure procedures embodied in § 104, but also the civil and criminal sanctions of § 109 and the compensation for idled-miners provisions of § 110.

However, in its search for Congressional intent, the Court of Appeals gave undue emphasis to the words "any mandatory health or safety standard" and, in doing so, ignored the teachings of *Richardson* v. *United States,* 369 U.S. 1, 11 (1962), that:

> ". . . in fulfilling our responsibility in interpreting legislation, 'we must not be guided by a single sentence or member of a sentence, but [should] look to the provisions of the whole law, and to its object and policy.' "

Accord: *Kokoszka* v. *Belford,* 417 U.S. 642 (1974).

Had the Court of Appeals construed the Act consistent with the applicable decisions of this Court, it would have concluded, we submit, as did the Department, that the existence of a significant and substantial safety hazard is a prerequisite to the issuance of a mine closure order under § 104(c)(1).

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[5] 80 Stat. 84.

CONCLUSION

For the above specified reasons, Petitioners pray that this Court grant a Writ of Certiorari to review the decision of the Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1003

INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA, *Petitioner*

v.

THOMAS S. KLEPPE, SECRETARY OF THE INTERIOR, *Respondent*

BITUMINOUS COAL OPERATORS ASSOCIATION, INC.
ZEIGLER COAL COMPANY, *Intervenors*

Petition for Review of an Order of the Board of Mine Operations Appeals

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Argued March 3, 1976

Decided April 13, 1976

Steven B. Jacobson, with whom *Joseph A. Yablonski* and *Harrison Combs,* were on the brief for petitioner.

Michael Kimmel, Attorney, Department of Justice, with whom *Rex E. Lee,* Assistant Attorney General and *Robert E. Kopp,* Attorney, Department of Justice, were on the brief for respondent.

William A. Gershuny, with whom *Guy Farmer* and *J. Halbert Woods,* were on the brief for intervenors BOAC and Zeigler Coal Company.

L. Thomas Galloway and *Joseph N. Onek* filed a brief on behalf of Council of the Southern Mountains, Inc., as *amicus curiae.*

Before: WRIGHT, McGOWAN and TAMM, *Circuit Judges*
Opinion for the Court filed by *Circuit Judge* TAMM.

TAMM, *Circuit Judge*: Petitioner, United Mine Workers of America ("UMWA"), seeks review of an order of the Interior Department's Board of Mine Operations Appeals (Board), reversing an administrative law judge's determination that a federal mine inspector's withdrawal order had properly issued. Petitioner challenges the Board's interpretation of 30 U.S.C. § 814(c)(1) as it relates to withdrawal orders.[1] The first sentence of section 814(c)(1) clearly states that a notice of violation may issue only if the violation of a mandatory health or safety standard is: (1) "of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard," and, (2)

[1] If, upon any inspection of a coal mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any notice given to the operator under this chapter. If, during the same inspection or any subsequent inspection of such mine within ninety days after the issuance of such notice, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (d) of this section, to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secreteary [sic] determines that such violation has been abated.

30 U.S.C. § 814(c)(1) (1971).

"caused by an unwarrantable failure of such operator. . . ." The second sentence of section 814(c)(1) clearly states that a withdrawal order may issue only if within ninety days of the issuance of the above notice, the inspector finds: (1) "another violation of any mandatory health or safety standard," and, (2) "such violation [is] also caused by an unwarrantable failure of such operator. . . ." In its review of the administrative law judge's decision that the withdrawal order had properly issued, the Board interpreted the second sentence of section 814(c)(1) to include *by implication* the "significantly and substantially" language of the first sentence. The issue on appeal then is whether Congress intended to apply this gravity criterion to the second sentence and therefore, to require another prerequisite to be met before a withdrawal order may issue pursuant to section 814(c)(1).

We conclude that the legislative history behind section 814(c)(1) clearly shows Congress meant what it said in the second sentence and therefore nothing more may be implied into it. Hence, we must reverse and remand to the Board for further consideration.

I. THE FACTUAL BACKGROUND

On April 28, 1972 a federal mine inspector issued a notice of violation to Zeigler Coal Company (Zeigler) pursuant to 30 U.S.C. § 814(c)(1), finding that the accumulation of loose coal and coal dust in the Williamson County, Illinois mine amounted to a violation of 30 C.F.R. § 75.400.[2] A subsequent inspection on May 11, 1972 resulted in the 10 a.m. issuance of the section 814(c)(1) withdrawal order in dispute here when the inspector found another violation of 30 C.F.R. § 75.400. After a

[2] Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein.

30 C.F.R. § 75.400 (1975).

general clean-up of the area, the order was terminated at 11:15 p.m.

On June 5, 1972, Zeigler filed a request for administrative review of this section 814(c)(1) withdrawal order. After a hearing, the administrative law judge denied Zeigler's application to vacate the order and specifically found that the "significantly and substantially" language of the first sentence did not operate on the withdrawal order portion of section 814(c)(1). Zeigler, joined by the Bituminous Coal Operators Association, appealed this decision to the Board of Mine Operations Appeals.

Citing the record's failure to reflect that the gravity criterion in section 814(c)(1) had been met, the Board reversed the administrative law judge's determination and declared the withdrawal order invalid.[4] UMWA's appeal to this court was held in abeyance pending reconsideration of this decision by the Board. Noting that an analysis of the legislative history was "unilluminating," the Board reaffirmed its prior decision on May 13, 1975, and this appeal followed.

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[3] The provisions of section 104(c)(1) quoted above show that it is not necessary in order to establish the validity of an order of withdrawal under this section, that there be a showing that the violation could significantly and substantially contribute to the cause and effect of a mandatory health or safety standard. It need only be shown that the violation was caused by the unwarrantable failure of the operator to comply with the standard. In my judgment, evidence has been introduced which does establish this requirement.

J.A. at 118.

[4] We conclude that Zeigler and BCOA were and are correct in their contention that the record must show that the violation in question could have significantly and substantially contributed "to the cause and effect of a mine safety or health hazard."

J.A. at 138.

II. The Legislative History Behind 30 U.S.C. § 814(c)(1)

Congressional attempts to provide adequate safeguards for the nation's miners date back to 1865. Each successive mining disaster over the years renewed the cry for more effective legislation. The Federal Coal Mine Health and Safety Act of 1969, which repealed the 1952 Act and its amendments, was enacted after a mine explosion on November 20, 1968 killed 78 workers in a Farmington, West Virginia mine.[5]

The primary purpose of the 1969 Act was to protect mining's most valuable resource—the miner. House Comm. on Education and Labor, 91st Cong., 2d Sess., Legislative History Federal Coal Mine Health and Safety Act 1 (Comm. Print 1970) ("House Leg. Hist."). In the first section of the Act Congress noted the "urgent need to provide more effective means and measures for improving the working conditions and practices in the Nation's coal mines in order to prevent death and serious physical harm. . . ." 30 U.S.C. § 801(c) (1971). In order to achieve these goals, Congress intended the Act to be liberally construed. House Leg. Hist. at 1025. Since the Act is a remedial and safety statute, this court must view section 814(c)(1) in the light most favorable to its broad purpose. *Freeman Coal Mining Co. v. Interior Board of Mine Operations Appeals*, 504 F.2d 741, 744 (7th Cir. 1974); *Phillips v. Interior Board of Mine Operations Appeals*, 500 F.2d 772, 782 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 938 (1975); *Reliable Coal Corp. v. Morton*, 478 F.2d 257, 262 (4th Cir. 1973). Following then the clear language

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[5] For a concise history of federal mine legislation, *see* House Comm. on Education and Labor, 91st Cong., 2d Sess., Legislative History Federal Coal Mine Health and Safety Act 1-14 (Comm. Print 1970).

of the statute and the obvious interpretation intended by Congress as elucidated by the legislative history discussed *infra,* we find that Congress' goals of legislating more effective meaures against health and safety hazards in mines is furthered by this reading of section 814(c)(1).

The section 814(c)(1) withdrawal order is an enforcement tool derived from the 1966 amendments to the 1952 Federal Coal Mine Safety Act. 80 Stat. 84. It was commonly referred to as a "reinspection closing order"[6] and provided that if within 90 days after a warning notice was given to an operator, an inspector found that any "similar such violation" existed, he must issue a withdrawal order. In their separate efforts to draft stronger enforcement tools, the House and Senate proposed various bills, in some cases maintaining this terminology and in others, changing the language.

The Senate bills vacillated between inserting "any such violation" language, eliminating a comparable section 814(c)(1) provision, and maintaining the former "any such similar violation" requirement. *See* SENATE COMM. ON LABOR AND PUBLIC WELFARE, 94TH CONG., 1ST SESS., LEGISLATIVE HISTORY OF THE FEDERAL COAL MINE HEALTH AND SAFETY ACT OF 1969 (PUBLIC LAW 91-173) 2236, 2345, 2382, 2443, 2530, 2694, 2796 Comm. Print. 1975). The proposed House bills also varied in like manner. *See Hearings on H.R. 4047, H.R. 4295, and H.R. 7976 Before a General Subcomm. on Labor of the House Comm. on Education and Labor,* 91st Cong., 1st Sess. 3, 19, 27 (1969).

The final statutory schemes arrived at by both Houses differed substantially in their respective effects. The House version, H.R. 13950, contemplated maintaining the prior "reinspection closing order." It kept the "any *similar* such" violation requirement. HOUSE LEG. HIST. at

[6] *Id.* at 6.

565, 588, 636, 928. The Senate bill, S. 2917, changed the requirement to violation of "any such" mandatory health or safety standard. HOUSE LEG. HIST. at 542. The difference which these choices of words makes is illustrated in the House and Senate Reports accompanying their respective bills.

The House Report makes clear that the violation which gives rise to the section 814(c)(1) notice, must be the same or similar to the violation which gives rise to the section 814(c)(1) withdrawal order:

> If the investigator finds a failure of an operator to comply with a mandatory health or safety standard, he shall issue a notice of the finding of the violation. Within 90 days the investigator shall reinspect the mine and *if the violation is found to continue,* he shall issue an order requiring the operator to withdraw all personnel until the violation has been abated.

HOUSE LEG. HIST. at 636 (emphasis added).

In contrast, the Senate Report explains that *any* further unwarrantable violation, regardless of whether it is similar to the violation which gives rise to the issuance of a notice, is sufficient basis for the issuance of a withdrawal order:

> If an inspector finds a violation of a standard that does not cause an imminent danger, but is of such a nature as could significantly and substantially contribute to any mine hazard, and if he finds that the violation is due to an unwarrantable failure to comply with the standard, he includes the finding in the notice. During any inspection within 90 days after issuance of the notice, if an inspector finds *another* violation which is *also* due to an unwarrantable failure of the operator to comply, he must order the miners withdrawn from the mine.

HOUSE LEG. HIST. at 37 (emphasis added).

The version of S. 2917 which was finally enacted makes it abundantly clear that *any* unwarranted violation of a mandatory health or safety standard is sufficient to justify issuance of a section 814(c)(1) withdrawal order. That the Conference Committee adopted the Senate version is clear from the "Statement of the Managers on the Part of the House":

> If, during that inspection or any subsequent inspection carried out within 90 days after the issuance of the notice, another violation of *any* such mandatory standard is discovered by the inspector and he finds that the violation is also caused by an unwarrantable failure to comply, the inspector is required to issue a withdrawal order. . . . The comparable provision of the House amendment required the inspector, in such a case, to cause the mine to be reinspected to determine if *any similar* violation exists. If such a *similar violation* did exist, and was caused by the unwarrantable failure of the operator to comply, the inspector would then issue a withdrawal order. *The substitute agreed upon in conference adopts the provision of the Senate version of section* 104(c)(1) [30 U.S.C. § 814(c)(1)] with technical changes to make clear that, if another violation of *any* mandatory health or safety standard occurs which is also caused by an unwarrantable failure of such operator to comply, then a withdrawal order must be issued.

HOUSE LEG. HIST. at 1029-30 (emphasis added).

III. CONCLUSION

The statute and the legislative history are clear. There is no gravity criterion required to be met before a section 814(c)(1) withdrawal order may properly issue.

We must therefore reverse and remand to the Board for further proceedings consistent with this opinion.[7]

So ordered.

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[7] Since the Board did not consider whether the operator's violation was "unwarrantable," we do not reach petitioner's claim that the Board's definition of "unwarrantable" misinterperts the statute. Although the Board has previously decided this question adversely to petitioner's position, Eastern Associated Coal Co., 3 IBMA 331, 349 (1974), J.A. 177, 195, we accept the Government's representation that the Board on remand will "take into account the legislative history upon which the Union relies. . . ." Br. at 50. The issue of the proper definition of "unwarrantable" will, of course, be open on any appeal following the remand proceedings.

(Caption Omitted in Printing)

Before: WRIGHT, MCGOWAN AND TAMM, *Circuit Judges.*

Order

(Filed May 6, 1976)

On consideration of respondent's petition for rehearing.

ORDERED by the Court that respondent's aforesaid petition is denied.

Per Curiam

For the Court:

GEORGE A. FISHER
Clerk

UNITED STATES DEPARTMENT OF THE INTERIOR

OFFICE OF HEARINGS AND APPEALS

INTERIOR BOARD OF MINE OPERATIONS APPEALS

4015 Wilson Boulevard
Arlington, Virginia 22203

ZEIGLER COAL COMPANY
(On Reconsideration)

Decided May 13, 1975

Petition by the Mining Enforcement and Safety Administration for reconsideration of the Board's opinion and order in the above-captioned docket reversing a decision by Administrative Law Judge James A. Broderick which upheld the validity of an unwarrantable failure withdrawal order issued pursuant to section 104(c)(1) of the Federal Coal Mine Health and Safety Act of 1969.

Reaffirmed.

1. Federal Coal Mine Health and Safety Act of 1969: Unwarrantable Failure: Notices of Violation

   Under section 105(a) of the Act, 30 U.S.C. § 815(a) (1970), an operator may file an application for review of a section 104(b) notice of violation with 104(c)(1) findings only if it wishes to challenge the reasonableness of time fixed for abatement. Subsequent to abatement, review of such notice under section 105(a) may be obtained only as an incident to the review of a related section 104(c)(1) withdrawal order.

APPEARANCES: Richard V. Backley, Esq., Assistant Solicitor, Madison McCulloch, Esq., for petitioner, Mining Enforcement and Safety Administration; Steven B. Jacobson, Esq., Richard L. Trumka, Esq., for appellee, United Mine Workers of America; J. Halbert Woods, Esq., for appellant, Zeigler Coal Company; Guy Farmer, Esq., Lynn

Poole, Esq., for intervenor, Bituminous Coal Operators' Association.

OPINION BY ADMINISTRATIVE JUDGE DOANE

On December 10, 1974, we handed down an opinion and order wherein we reversed a decision upholding the validity of a withdrawal order which had been issued at the No. 4 Mine of Zeigler Coal Company (Zeigler) by a federal coal mine inspector pursuant to section 104(c)(1) of the Federal Coal Mine Health and Safety Act of 1969. 30 U.S.C. § 814(c)(1) (1970). Subsequently, on January 13, 1975, the Mining Enforcement and Safety Administration (MESA) filed a timely Petition for Reconsideration pursuant to 43 CFR 4.604. Having concluded that further exploration of the issues here involved was warranted, we granted the petition, called for fresh briefs, and held oral argument. Upon full reconsideration, we have decided to reaffirm our initial decision as clarified herein.

I.

Procedural and Factual Background

The withdrawal order, 1 HC, which is the subject of this controversy was issued on May 11, 1972, and cited Zeigler for an alleged violation of 30 U.S.C. § 864(a) (1970), 30 CFR 75.400, which proscribes "accumulations" of combustible materials and requires their cleanup. Subsequent to the abatement of the subject violation, Zeigler filed an Application for Review of the instant withdrawal order in the Hearings Division pursuant to section 105 of the Act. 30 U.S.C. § 815 (1970).

Thereafter, Answers in opposition were filed respectively by MESA and the United Mine Workers of America (UMWA), as a representative of the miners at the Zeigler No. 4 Mine. A hearing on the merits was held by Administrative Law Judge James A. Broderick on June 20, 1973, at which time all parties were represented.

Judge Broderick issued his decision on November 13, 1973, and Zeigler then noted a timely appeal therefrom on November 26, 1973. Pursuant to proper motion, on December 14, 1973, we granted leave to intervene to the Bituminous Coal Operators' Association (BCOA). Timely briefs were then filed by Zeigler, MESA, and BCOA. The UMWA had notice of the appeal but nevertheless apparently chose not to participate since it filed no brief.[1]

On appeal, Zeigler contended that the subject withdrawal order was invalid on four grounds. First, it argued that there was no proof of the existence of an underlying notice of violation issued pursuant to section 104(c)(1) of the Act. Second, it asserted that Judge Broderick erroneously concluded that he need *not* find that the violation cited in the subject section 104(c)(1) withdrawal order "• • • could significantly and substantially contribute to the cause and effect of a mine safety or health hazard." Third, it insisted that the alleged violation cited in the subject withdrawal order was not the product of an unwarrantable failure to comply. Finally, it submitted that the masses of material found by the inspector were too wet to be combustible and thus were not in violation of the Act.

We decided in favor of MESA with respect to Zeigler's first argument, holding that the record contained an admission by a witness called to the stand by Zeigler which established the existence of the alleged underlying notice of violation. However, we held with Zeigler on its second contention and reversed, concluding that, if challenged, it must be proved that a 104(c) violation "• • • could significantly and substantially contribute to the cause and effect of a mine safety or health hazard." We found it unnecessary to deal with the two remaining questions presented.

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[1] The UMWA did not participate in the initial stage of this appeal, but none of the parties has interposed an objection to the filing of the Union's brief on reconsideration or its participation in the ensuing oral argument. See *Old Ben Coal Corp.*, 4 IBMA 104, 82 I.D. ——, 1974-1975 OSHD par. —— (1975).

In the course of dealing with the first question, concerning the sufficiency of the proof of the existence of the underlying notice, we denied a preliminary objection raised by MESA on jurisdictional grounds. MESA argued that Zeigler could have filed an Application for Review of the notice by itself within 30 days of its issuance under section 105 of the Act, 30 U.S.C. § 815(a) (1970), and having failed to do so, was barred from raising any question with respect to it thereafter. We rejected that argument, holding that, having timely filed an Application for Review of the subject section 104(c)(1) withdrawal order, Zeigler had fully invoked the review jurisdiction of the Secretary regarding any allegation of invalidity concerning such withdrawal order, including the lack of an underlying notice of violation. In dictum, we indicated that even if Zeigler had been aware of the underlying notice and had wanted to challenge the validity of such notice prior to the issuance of the subject withdrawal order, it could not have done so by filing an Application for Review.

On January 13, 1975, MESA petitioned the Board to reconsider its decision. By order dated January 14, 1975, the Board granted MESA's petition. Subsequently, timely briefs by all parties including the UMWA were filed. Oral argument before the Board took place on March 10, 1975.

MESA in its brief on reconsideration challenges our decision in a number of respects. Only two of the objections raised require further comment, the others being without merit and too insubstantial for extended discussion.[2] In

[2] MESA has claimed that we erroneously placed the burden of proof on it to show the existence of an underlying notice. *See Zeigler Coal Co.*, 4 IBMA 88, 82 I.D. ——, 1974-1975 OSHD par. —— (1975). MSA has also argued that we were in error in holding that the subject violation could have significantly and substantially contributed to the cause and effect of a mine safety or health hazard. As to the latter, it suffices to point out that this entire case has been litigated on the theory that the subject violation did not pose such a "hazard." Indeed MESA explicitly conceded as much in its initial appellate brief. Br. of MESA, p. 14, n. 2.

particular, we are giving further attention in this opinion to defining the Secretary's review jurisdiction under section 105 of the Act, as we understand it, over notices of violation issued pursuant to section 104(c)(1) and to the gravity prerequisite, if any, of a valid 104(c)(1) withdrawal order.

II.

Issues on Reconsideration

A. Whether the Board erred in concluding that Zeigler Coal Company was not jurisdictionally barred from claiming that the subject section 104(c)(1) withdrawal order was invalid on the ground that there was not underlying notice of violation.

B. Whether the Board erred in holding that the requirement stated in the phrase "• • • could significantly and substantially contribute to the cause and effect of a mine safety or health hazard • • •" is a prerequisite to the issuance of a withdrawal order pursuant to section 104(c)(1) of the Act.

III.

Discussion

A.

In challenging our holding that Zeigler was *not* jurisdictionally barred from claiming that the subject 104(c)(1) withdrawal order was invalid on the ground of a lack of an underlying notice of violation, MESA argues that Zeigler could only have attacked the validity of the notice by filing an Application for Review of such notice within thirty days of its issuance. Although MESA acknowledges that section 105, the administrative review provision of the Act, does not literally support its position, it contends nevertheless that the congressional failure to so provide was merely legislative oversight. MESA asks us to imply into section

105 any necessary words or phrases to support MESA's position in the interest of effectuating the supposed legislative intent. We are told that if we hold for MESA in this matter we will be doing no violence to the plain meaning of section 105, and we are in effect warned that the failure to so hold will create a conflict between section 104(c)(1) and the Due Process Clause of the Fifth Amendment to the Constitution. Br. of MESA on reconsideration, p. 3.

At the outset, we note that Zeigler did not attack the validity of the subject notice of violation. Rather, the company denied that such notice had ever been issued. If we were to reverse ourselves on the narrow holding of this case, we would be in the absurd position of saying that an applicant for review is precluded from denying the issuance of an underlying notice of violation in a proceeding to review a related 104(c)(1) withdrawal order because the applicant failed to make that assertion at a time when it claims to have been in ignorance of such notice. Even if we now agreed to set aside our previous dicta with respect to the review jurisdiction of the Secretary over challenges to the *validity* of notices of violation issued pursuant to section 104(c)(1), we would have to reaffirm our initial holding in order to avoid an otherwise untenable and wholly capricious result. Thus, we remain committed to the proposition that an applicant for review may challenge the validity of a 104(c)(1) withdrawal order on the ground that it is not supported by a pre-existing notice of violation containing findings pursuant to section 104(c)(1).

[1] We turn now to MESA's objections to the soundness of our dictum that an applicant for review may only challenge the validity of a notice of violation issued pursuant to section 104(c)(1) as an incident of the review of a related (c)(1) withdrawal order. It is really the dictum, rather than the narrow holding on the jurisdictional issue, to which MESA has directed its arguments in this phase of the reconsideration.

In attacking our previously stated views, MESA contends that the kind of notice of violation now before the Board is properly described as a section 104(b) notice with 104(c)(1) findings. Previously, we have referred to such citations as 104(c)(1) notices. *See Eastern Associated Coal Corp.*, 3 IBMA 331, 81 I.D. 567, 1974-1975 OSHD par. 18,706 (1974).[3]

Inasmuch as section 104(c)(1) does not, in so many words, direct the issuance of a notice of violation, we accept MESA's characterization of such notices as an alternative description. The impact of this modification of viewpoint is, however, minimal. All that such acceptance implies is that an applicant for review under section 105(a) of the Act may challenge a 104(b) notice with (c)(1) findings with respect to the reasonableness of time fixed for abatement. 30 U.S.C. § 815(a) (1970); *Freeman Coal Mining Company*, 1 IBMA 1, 77 I.D. 149, 1971-1973 OSHD par. 15,367 (1970); *Reliable Coal Corporation*, 1 IBMA 50, 78 I.D. 199, 1971-1973 OSHD par. 15,368 (1971).

Such conclusion does not commit us to agreeing with MESA's further contention that an operator may challenge the validity of a 104(b) notice with (c)(1) findings, in advance of the issuance of a related 104(c)(1) withdrawal order, where the violation cited therein has been abated. If we were to accept that contention, we would have to do more than simply insert words or phrases, as MESA suggests; we would be obliged to ignore the plainly stated limitation of review of notices of violation under section 105 to issues bearing on the reasonableness of time fixed for abatement. *See Reliable Coal Corp., supra.* As we have indicated before, proper respect for legislative authority and the separation of powers dictate that we reject so-called interpretations which are in reality *de facto* amend-

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[3] This decision has been reaffirmed by the Board upon reconsideration. 3 IBMA 383, 81 I.D. 627, 1974-1975 OSHD par. —— (1974).

ments to the Act. *See Eastern Associated Coal Corp.*, 4 IBMA 1, 82 I.D. —, 1974-1975 OSHD par. 19,224 (1975) [4]; *cf. United States Fuel Co.*, 2 IMBA 315, 321, 80 I.D. 739, 1973-1974 OSHD par. 16,954 (1973). Since we believe that ignoring the statutory limitation on the scope of review of notices of violation would indeed amount to a *de facto* amendment, we reject such interpretation.

Before closing this phase of our reconsideration, a word or two is in order with regard to MESA's rationale for interpreting section 105(a) in the manner that it has urged on us. MESA contends in substance that denial of the opportunity for prompt review of a 104(b) notice with (c)(1) findings, where the violation is abated in advance of the issuance of a related 104(c)(1) withdrawal order, would render such order unconstitutional, there having been on opportunity for prior hearing.[5] According to MESA, the Due Process Clause of the Fifth Amendment to the Constitution requires such hearings in instances where there is no "imminent peril." Br. of MESA on reconsideration, p. 2.

We have not undertaken to determine the validity of MESA's constitutional argument because, as an administrative tribunal within the Executive Branch, the Board is not possessed of the "judicial power of the United States" under Article III of the Constitution and has no jurisdiction to make any adjudicative determination as to the extent of congressional power to authorize a deprivation of property without opportunity for prior hearing.[6] *See*, however, *Ewing* v. *Mytinger and Casselberry*, 339 U.S. 594 (1950).[7]

[4] An appeal of the Board's decision in this case is pending in the United States Court of Appeals for the District of Columbia Circuit. No. 75-1107.

[5] *See Zeigler Coal Co., supra*, 3 IBMA at 455, n. 4. *See* also 5 U.S.C. §§ 701-706 (1970) and *Capital Coal Sales* v. *Mitchell*, 164 F. Supp. 161 (D.C. D.C. 1958), *affd.* 282 F.2d 486 (D.C. Cir. 1960).

To sum up: we are reaffirming our initial holding. In a section 105 proceeding to review a section 104(c)(1) withdrawal order, there is no jurisdictional bar to a claim that such withdrawal order is invalid for a lack of any underlying notice of violation. With respect to the scope of review of a section 104(b) notice with (c)(1) findings under section 105, the Board is of the view that, so long as the violation cited in such notice remains unabated, an operator may file an Application for Review to contest the reasonableness of time fixed for abatement. Once the violation is abated and in advance of the issuance of a related (c)(1) withdrawal order, there is no right under section 105(a) for *administrative* review. Such notice, although abated, may be reviewed under section 105(a) of the Act, but only as an incident to the determination of validity of a related section 104(c)(1) withdrawal order.

B.

We come now to the major substantive question presented on reconsideration. MESA, supported by the UMWA, contends that the Board erred in holding that the express requirement for a section 104(c)(1) notice stated in the phrase "• • • could significantly and substantially contribute to the cause and effect of a mine safety or health hazard • • •" is an implied prerequisite in the violation giving rise to the issuance of a section 104(c)(1) with-

[6] *See United States* v. *Nixon*, —— U.S. ——, 94 S. Ct. 3090, 3106 (1974); *Public Utilities Comm'n. of California* v. *United States*, 355 U.S. 534, 539-40 (1958); *Panitz* v. *District of Columbia*, 112 F.2d 39 (D.C. Cir. 1940).

[7] *Compare Fuentes* v. *Shevin*, 407 U.S. 67, 90-92, n. n. 27, 28 (1972) *with Mitchell* v. *W. T. Grant Co.*, —— U.S. ——, 94 S. Ct. 1895, 1902 (1974).

drawal order. Zeigler and BCOA support the Board's original conclusion.[8]

For the respective reasons stated in their briefs, MESA and the UMWA would have us conclude that the elements of proof subject to dispute in a proceeding to review a section 104(c)(1) withdrawal order, apart from a valid underlying notice of violation, are only those which are expressly stated in the Act. Those elements are: (1) that the condition or practice found by the inspector constitutes a violation of a mandatory health or safety standard, and (2) that such violation was the result of an unwarrantable failure to comply with such legislated standard of care.[9]

When we first dealt with this section of the Act [10] in *Eastern Associated Coal Corp., supra* (cited at 147), we

[8] BCOA argues that, unless we reaffirm the result reached in our initial decision and reject the statutory construction theory advanced by MESA and the UMWA, we will render section 104(c) unconstitutional. We have not undertaken to resolve this constitutional argument because, for the reasons stated earlier, we think that its resolution is beyond our authority. *See* n. 6, *supra*.

[9] We observe in passing that MESA's view of the extent of congressional power to authorize a taking of property without prior hearing undercuts its argument with respect to the criteria of validity for a section 104(c)(1) withdrawal order and amounts to an implied concession that section 104(c) is invalid.

[10] Section 104(c) of the Act provides as follows:

"(c)(1) If, upon any inspection of a coal mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any notice given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within ninety days after the issuance of such notice, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons referred to in subsection (d) of this section, to be withdrawn from and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

"(2) If a withdrawal order with respect to any area in a mine has been issued pursuant to paragraph (1) of this subsection, a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) of this subsection until such time as an inspection of such mine discloses no similar violations. Following an inspection of such mine which discloses no similar violations, the provisions of paragraph (1) of this subsection shall again be applicable to that mine."

faced a challenge to a section 104(c)(2) withdrawal order *by an operater* who, like MESA and the UMWA in the instant case, contended that the prerequisite elements of proof for a withdrawal order under section 104(c) were only those expressly stated in the Act, namely, the existence of a violation and unwarrantable failure. After examining the literal language of this section, we concluded preliminarily that the statutory phrases contained a number of serious ambiguities, and further, that the subsections of section 104(c) provided for a sequence of events which were inextricably linked together. Based on these initial conclusions, we decided to construe section 104(c) as a whole and to infer its true meaning from its intended purposes and to place in the overall enforcement scheme, bearing in mind that we must stay within the available leeway of the statutory language. 3 IBMA at 347. We ultimately held that, in addition to proof of any underlying notice or orders, as the case may require, the prerequisites to a valid withdrawal order under section 104(c)

are as follows: (1) that there is proof of a viclation; (2) that such violation did not cause an imminent danger; (3) that such violation could have significantly and substantially contributed to the cause and effect of a mine safety or health hazard; and (4) that such violation was caused by an unwarrantable failure to comply. Although the first and fourth prerequisites only are mentioned with respect to section 104(c) withdrawal orders, we reasoned that the Congress intended that the second and third, which are expressly mentioned with respect to the underlying notice, be carried forward by implication and applied to the related withdrawal orders. Furthermore, in applying these criteria, we concluded: (1) that unwarrantable failure is a standard of fault which encompasses standards of care [11]; and (2) that the clause "* * * could significantly and substantially contribute to the cause and effect of a mine safety or health hazard * * *" was a phrase of art and referred to violations posing a probable risk of serious bodily harm or death. 3 IBMA at 356. Lastly, we rejected the theory that the violations in a given 104(c) sequence must be substantively similar to each other in kind. 3 IBMA at 352.[12]

In attacking the result that we reached in our initial consideration of this appeal, the lines of argument pursued by the UMWA and MESA, respectively, vary somewhat.

The UMWA attacks the underlying basis for the reasoning and conclusions set forth in *Eastern Associated Coal*

[11] As we noted above, we did not reach the merits in this case of the question as to whether the subject violation was caused by an unwarrantable failure to comply.

[12] Substantive recidivism, that is repeated violation of the same mandatory standard, is reflected in penalty assessments because, under section 109, the Secretary must take previous history of violations into account. Deterrence of such repeated misbehavior under section 104(c) is at most a lesser included enforcement objective provided that the other criteria of validity are satisfied.

Corp., supra, and applied to the case at hand. The UMWA argues that section 104(c), and in particular subsection (c)(1), is such a model of clarity that there is no room for an extended exercise in statutory construction.

Although MESA agrees with the literalist position taken by the UMWA, it buttresses its viewpoint with arguments based on the legislative history. MESA submits in substance that a comparison between section 104(c) of the Act and the pertinent 1966 amendments to the Federal Coal Mine Safety Act of 1952 supports the conclusion that violations which could *not* significantly and substantially contribute to the cause and effect of a mine safety or health hazard may be the subject of a 104(c)(1) withdrawal order. MESA also draws support from a comparison between the Senate bill and the House version of section 104(c) which ultimately became the law, as well as from statements contained in committee reports. Br. of MESA on reconsideration, pp. 10-13.

We turn initially to the UMWA's argument. Having reexamined the literal words of section 104(c), we still find that they are ambiguous and inconclusive in a number of vital respects which the Union has glossed over.

First, there is the phrase "* * * could significantly and substantially contribute to the cause and effect of a mine safety or health hazard * * *," which is at the crux of the present dispute. If we were to give each of the words of that clause an ordinary meaning, it would become a superfluous truism; by definition, the violation of any mandatory standard could significantly and substantially contribute to the cause and effect of a mine safety or health hazard. However, since it is plain that the Congress intended by these words to enact one of several discriminating criteria designed to separate those violations that merit 104(c) treatment from those that do not, such a literal interpretation would be squarely at odds with the apparent con-

gressional intent. Such interpretation would render the phrase nugatory when the Board is obliged under the usual norms of statutory construction to give meaning to all the terms of a statute. Sutherland, *Statutes and Statutory Construction*, § 46.06 (4th ed. 1973).

Second, there is the meaning of the term "unwarrantable failure to comply." The Congress pointedly omitted any binding definition of this term in its list of statutory definitions embodied in section 2 of the Act, thus leaving the resolution of its meaning to case-by case adjudication by the Secretary, with only the scantiest guidance in the legislative history. *See* 30 U.S.C. § 802 (1970); *Eastern Associated Coal Corp., supra,* 3 IBBMA at 355-6.

Then too, there is the question of the proper interpretation of the "similarity" requirement of section 104(c)(2). In its brief, the UMWA asserts: "A 'similar violation' is obviously any violation of a mandatory health or safety standard which, like a *violation* which results in the issuance of a section 104(c)(1) withdrawal order, is 'caused by an unwarrantable failure.'" [Emphasis added.] The pertinent statutory clause reads as follows:

> If a withdrawal order with respect to any area in a mine has been issued pursuant to paragraph (1) of this subsection, a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of violations similar to *those* that resulted in the issuance of the withdrawal order under paragraph (1) • • •. [Emphasis added.]

A comparison of the UMWA's paraphrase and the actual language of the Act reveals that the Union has failed to note the use of a plural pronoun, namely, "those." The (c)(2) violation must be similar to "*those*" violations which gave rise to a (c)(1) withdrawal order, and not just similar to *the* violation cited in the (c)(1) order. Literally speaking, the violation cited in the underlying 104(c)(1)

notice does give rise to the related (c)(1) withdrawal order and we have no choice other than to conclude that a (c)(2) violation must be similar to that violation as well. The ambiguity created by this vague plural pronoun is that although it suggests that there is an easily identifiable nucleus of common characteristics, when one looks to subsection (c)(1), it is not at all clear of what that nucleus consists. In strictly literal terms, there are two characteristics that are expressly mentioned with respect to (c)(1) notices of violation but omitted in the provision for a related withdrawal order. It is not certain whether the Congress intended that the nucleus of common characteristics includes only those that are expressly mentioned with regard to the withdrawal order as well as the notice, or if the legislators intended that this nucleus include all the characteristics mentioned in the provision for a notice of violation, the disputed ones being carried forward by implication. The language of section 104(c) on its face provides no apparent resolution to this problem.

Although we could go further and belabor the point, the ambiguities already pointed out suffice to show that the literal words are inconclusive on key points as to what Congress intended. Thus, out of necessity, we have been obliged to construe the provisions of section 104(c) with an eye to the overall legislative enforcement policy, an approach which we would take in any event.

We come then to MESA's arguments based on the legislative history.

With respect to the comparisons drawn by MESA between the language of section 104(c) and the 1966 amendments to the Federal Coal Mine Safety Act of 1952, we stated the following in our initial opinion, 3 IBMA at 461, n. 10:

> • • • We have found particularly unpersuasive comparisons of section 104(c) to portions of statutory

> ancestors of the Act since the Congress took the trouble to repeal them *in toto* rather than to amend. 83 Stat. 803 (1969).

MESA has shown no reason to cause us to change our viewpoint and we reaffirm it.

With respect to comparisons drawn from language of committee reports and the Senate and House versions of section 104(c), we previously indicated that the products of such analysis were unilluminating. *Zeigler, supra,* 3 IBMA at 461, n. 10. Indeed MESA in its brief at page 14 after extensively quoting from inconsistent events noted in the legislative history concluded in part:

> Neither the 1966 Amendment nor all the bills introduced in the development of the 1969 Act give much historical basis, above and beyond its plain meaning, for the language ultimately derived as the 104(c) unwarrantable failure provisions • • •.

Thus, it seems to us now, as it did before, that the meaning of the phrase "• • • could significantly and substantially contribute to the cause and effect of a mine safety or health hazard • • •," as well as the question of whether that phrase and the requirement of a finding of no imminent danger are implied criteria of the validity of a 104(c)(1) or (2) withdrawal order, can best be determined by looking to the purposes of section 104(c) in the overall enforcement policy mandated by the Congress.

In *Eastern Associated Coal Corp., supra,* we analyzed at length the overall enforcement scheme and same to the general conclusion that the legislative policy was a blend of measured deterrence and protective reaction for the safety of affected miners, with each enforcement tool directed toward a particular class of conditions or practices. 3 IBMA at 348-351. More specifically, we concluded that section 104(c), involving as it does, ongoing liability to further withdrawal orders, contains the sharpest of the

enforcement tools provided to the Secretary and accordingly should be applied in situations calling for vigorous protective reaction and maximum deterrence.

Against this background and in order to give effect to all the statutory terms, we held and still believe that the clause "• • • could significantly and substantially contribute to the cause and effect of a mine safety or health hazard • • •" is a phrase of art. The key word of that clause is "hazard" which in our view refers not to just any violation, but rather to violations posing a risk of serious bodily harm or death. The part of the clause which reads "• • • could significantly and substantially contribute to the cause and effect • • •" states a probability requirement, designed in our opinion, to prevent application of section 104(c) to largely speculative "hazards." Neither MESA nor the UMWA has offered any reasonable alternative construction of this clause which would give it the discriminating effect that the Congress intended.

As a further consequence of our analysis of the congressional policy, we were compelled to imply the gravity requirement stated in the clause just discussed, as well as the requirement of a finding of no imminent danger, into the portions of section 104(c) which deal with withdrawal orders. We did so out of a desire to avoid absurd or anomalous results.

Although MESA is silent with respect to the absurdities that we spoke of in *Eastern Associated Coal Corp., supra,* the UMWA in its brief anud at oral argument upon reconsideration denied that any such problems would occur as a result of adopting its interpretation of the Act, that is, that the prerequisites of a valid section 104(c)(1) or (2) withdrawal order are only: (1) violation of a mandatory health or safety standard, and (2) unwarrantable failure to comply. Therefore, we deem it appropriate to point out in plain terms the likely problem areas.

In the case at hand, the violation cited in the subject withdrawal order was conceded to be a relatively insignificant accumulation of combustible materials, that is to say, such accumulation did not pose a probable risk of serious bodily harm or death. Let us suppose *arguendo,* that there was a valid underlying notice of violation based upon a roof control violation, and further, that there was a subsequent 104(c)(2) withdrawal order citing the lack of an adequate number of sanitary toilet facilities. 30 CFR 71.500. Under the theory advanced by the UMWA and MESA, all that would be necessary to sustain the validity of the withdrawal orders would be proof of unwarrantable failure. Since unwarrantable failure is simply a standard of fault, these violations could conceivably be comparatively nonserious. If such were the case, then under the theory advanced by MESA and the UMWA, we would have to conclude that the notice of violation had issued validly for a violation posing a probable risk of serious bodily harm or death, and that the withdrawal orders, with all their potential for ongoing liability, had issued validly for violations, neither of which posed such a compelling risk to the miners. Moreover, it is quite likely that in subsequent civil penalty proceedings under section 109 of the Act, a larger penalty would be assessed for the violation cited in the (c)(1) notice than for the substantively unrelated violations cited in the withdrawal orders. Thus, lesser statutory sanctions would be imposed for the most threatening of these deviations from the mandatory standards, while more imposing sanctions would be applied to objectively lesser infractions. Such results would be squarely at odds with the congressional enforcement strategy which calls for a graduated response to operator misbehavior. They would also add a punitive element which we think Congress reserved for criminal sanctions. *See* 30 U.S.C. § 819(b) (1970).

Then too, if we were to adopt the literalist construction, we would thereby thrust upon federal coal mine inspectors

unbounded discretion to decide whether to issue 104(a) imminent danger or 104(c) unwarrantable failure withdrawal orders in certain circumstances. The former may be issued irrespective of fault, and under the literalist theory, the latter could be issued irrespective of imminent danger because, so it is argued, the requirement of a finding of *no imminent* danger, expressly applicable to 104(c)(1) notices, is not impliedly applicable to 104(c) withdrawal orders. Thus, in an instance of imminent danger which coincidentally was the result of a violation caused by an unwarrantable failure, an inspector would be totally at large in determining whether to issue a 104(a) order or a 104(c) order. While the immediate result would be largely identical, namely, withdrawal of persons from affected areas, the principal difference would be in the ongoing liability to further withdrawal orders which is part and parcel of a 104(c) withdrawal order. Whatever the inspector's decision, it would be arbitrary, and given the diversity of human behavior, inspectors would issue differing orders with respect to factual situations which are not significantly distinguishable.

The lack of consistency of application and the arbitrary character of such important determinations by inspectors pose severe, possibly intractable problems of law and policy. As a matter of law, the federal courts would be forced to deal with serious due process objections. As a matter of policy, the ongoing effort of the Secretary through his delegates to achieve the congressional objective of inducing greatly improved standards of care in the nation's underground coal mines would be compromised in several ways. On the one hand, inconsistent and capricious enforcement practices are bound to penalize all operators at one time or another. On the other, indiscriminate application of maximum deterrent force is bound to dull the galvanizing shock of this unique species of withdrawal order which disrupts mining activities *and* threatens further such disruption, as well as initiates

the civil penalty process which goes forward in the case of any violation of the mandatory standards.

In sum, having fully reconsidered our previously articulated position on the proper interpretation of section 104(c) and the conclusions reached in our initial opinion in this case, we find no merit in the arguments presented by the petitioner MESA or the UMWA. It is therefore the judgment of the Board that its decision in this case should be reaffirmed as embodying a reasonable and workable construction of section 104(c).

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the decision of the Board in the above-captioned docket upon reconsideration IS REAFFIRMED.

Board of Mine Operations Appeals
By: /s/ DAVID DOANE
DAVID DOANE
Administrative Judge

We concur:

/s/ C. E. ROGERS, JR.
C. E. ROGERS, JR.
Chief Administrative Judge

/s/ JAMES R. RICHARDS
JAMES R. RICHARDS
Ex-Officio Member of the Board
Director
Office of Hearings and Appeals

Findings, Notices, and Orders

SEC. 104. (a) If, upon any inspection of a coal mine, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the area throughout which such danger exists, and thereupon shall issue forthwith an order requiring the operator of the mine or his agent to cause immediately all persons, except those referred to in subsection (d) of this section, to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger no longer exists.

(b) Except as provided in subsection (i) of this section, if, upon any inspection of a coal mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard but the violation has not created an imminent danger, he shall issue a notice to the operator or his agent fixing a reasonable time for the abatement of the violation. If, upon the expiration of the period of time as originally fixed or subsequently extended, an authorized representative of the Secretary finds that the violation has not been totally abated, and if he also finds that the period of time should not be further extended, he shall find the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to cause immediately all persons, except those referred to in subsection (d) of this section, to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that the violation has been abated.

(c)(1) If, upon any inspection of a coal mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger,

such violation is of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any notice given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within ninety days after the issuance of such notice, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (d) of this section, to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

(2) If a withdrawal order with respect to any area in a mine has been issued pursuant to paragraph (1) of this subsection, a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of violations similar to those that result in the issuance of the withdrawal order under paragraph (1) of this subsection until such time as an inspection of such mine discloses no similar violations. Following an inspection of such mine which discloses no similar violations, the provisions of paragraph (1) of this subsection shall again be applicable to that mine.

(d) The following persons shall not be required to be withdrawn from, or prohibited from entering, any area of the coal mine subject to an order issued under this section:

(1) any person whose presence in such area is necessary, in the judgment of the operator or an authorized representative of the Secretary, to eliminate the condition described in the order;

(2) any public official whose official duties require him to enter such area;

(3) any representative of the miners in such mine who is, in the judgment of the operator or an authorized representative of the Secretary, qualified to make coal mine examinations or who is accompanied by such a person and whose presence in such area is necessary for the investigation of the conditions described in the order; and

(4) any consultant to any of the foregoing.

(e) Notices and orders issued pursuant to this section shall contain a detailed description of the conditions or practices which cause and constitute an imminent danger or a violation of any mandatory health or safety standard and, where appropriate, a description of the area of the coal mine from which persons must be withdrawn and prohibited from entering.

(f) Each notice or order issued under this section shall be given promptly to the operator of the coal mine or his agent by an authorized representative of the Secretary issuing such notice or order, and all such notices and orders shall be in writing and shall be signed by such representative.

(g) A notice or order issued pursuant to this section, except an order issued under subsection (h) of this section, may be modified or terminated by an authorized representative of the Secretary.

(h)(1) If, upon any inspection of a coal mine, an authorized representative of the Secretary finds (A) that conditions exist therein which have not yet resulted in an imminent danger, (B) that such conditions cannot be effec-

tively abated through the use of existing technology, and (C) that reasonable assurance cannot be provided that the continuance of mining operations under such conditions will not result in an imminent danger, he shall determine the area throughout which such conditions exist, and thereupon issue a notice to the operator of the mine or his agent of such conditions, and shall file a copy thereof, incorporating his findings therein, with the Secretary and with the representative of the miners of such mine. Upon receipt of such copy, the Secretary shall cause such further investigation to be made as he deems appropriate, including an opportunity for the operator or a representative of the miners to present information relating to such notice.

(2) Upon the conclusion of such investigation and an opportunity for a public hearing upon request by any interested party, the Secretary shall make findings of fact, and shall by decision incorporating such findings therein, either cancel the notice issued under this subsection or issue an order requiring the operator of such mine to cause all persons in the area affected, except those persons referred to in subsection (d) of this section, to be withdrawn from, and be prohibited from entering, such area until the Secretary, after a public hearing affording all interested persons an opportunity to present their views, determines that such conditions have been abated. Any hearing under this paragraph shall be of record and shall be subject to section 554 of title 5 of the United States Code.

(i) If, based upon samples taken and analyzed and recorded pursuant to section 202(a) of this Act, or samples taken during an inspection by an authorized representative of the Secretary, the applicable limit on the concentration of respirable dust required to be maintained under this Act is exceeded and thereby violated, the Secretary or his authorized representative shall issue a notice fixing

a reasonable time for the abatement of the violation. During such time, the operator of the mine shall cause samples described in section 202(a) of this Act to be taken of the affected area during each production shift. If, upon the expiration of the period of time as originally fixed or subsequently extended, the Secretary or his authorized representative finds that the period of time should not be further extended, he shall find the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to cause immediately all persons, except those referred to in subsection (d) of this section, to be withdrawn from, and to be prohibited from entering, such area until the Secretary or his authorized representative has reason to believe, based on actions taken by the operator, that such limit will be complied with upon the resumption of production in such mine. As soon as possible after an order is issued, the Secretary, upon request of the operator, shall dispatch to the mine involved a person or team of persons, to the extent such persons are available, who are knowledgeable in the methods and means of controlling and reducing respirable dust. Such person or team of persons shall remain at the mine involved for such time as they shall deem appropriate to assist the operator in reducing respirable dust concentrations. While at the mine, such persons may require the operator to take such actions as they deem appropriate to insure the health of any person in the coal mine.

Review by the Secretary

SEC. 105. (a)(1) An operator issued an order pursuant to the provisions of section 104 of this title, or any representative of miners in any mine affected by such order or by any modification or termination of such order, may apply to the Secretary for review of the order within thirty days of receipt thereof or within thirty days of its modification or termination. An operator issued a notice

pursuant to section 104(b) or (i) of this title, or any representative of miners in any mine affected by such notice, may, if he believes that the period of time fixed in such notice for the abatement of the violation is unreasonable, apply to the Secretary for review of the notice within thirty days of the receipt thereof. The applicant shall send a copy of such application to the representative of miners in the affected mine, or the operator, as appropriate. Upon receipt of such application, the Secretary shall cause such investigation to be made as he deems appropriate. Such investigation shall provide an opportunity for a public hearing, at the request of the operator or the representative of miners in such mine, to enable the operator and the representative of miners in such mine to present information relating to the issuance and continuance of such order or the modification or termination thereof or to the time fixed in such notice. The finding of an application for review under this subsection shall not operate as a stay of any order or notice.

(2) The operator and the representative of the miners shall be given written notice of the time and place of the hearing at least five days prior to the hearing. Any such hearing shall be of record and shall be subject to section 554 of title 5 of the United States Code.

(b) Upon receiving the report of such investigation, the Secretary shall make findings of fact, and he shall issue a written decision, incorporating therein an order vacating, affirming, modifying, or terminating the order, or the modification or termination of such order, or the notice, complained of and incorporate his findings therein.

(c) In view of the urgent need for prompt decision of matters submitted to the Secretary under this section, all actions which the Secretary takes under this section shall be taken as promptly as practicable, consistent with adequate consideration of the issues involved.

(d) Pending completion of the investigation required by this section, the applicant may file with the Secretary a written request that the Secretary grant temporary relief (1) from any modification or termination of any order, or (2) from any order issued under section 104 of this title, except an order issued under section 104(a) of this title, together with a detailed statement giving reasons for granting such relief. The Secretary may grant such relief, under such conditions as he may prescribe, if—

(1) a hearing has been held in which all parties were given an opportunity to be heard;

(2) the applicant shows that there is substantial likelihood that the findings of the Secretary will be favorable to the applicant; and

(3) such relief will not adversely affect the health and safety of miners in the coal mine.

No temporary relief shall be granted in the case of a notice issued under section 104(b) or (i) of this title.

Judicial Review

SEC. 106. (a) Any order or decision issued by the Secretary or the Panel under this Act, except an order or decision under section 109(a) of this Act, shall be subject to judicial review by the United States court of appeals for the circuit in which the affected mine is located, or the United States Court of Appeals for the District of Columbia Circuit, upon the filing in such court within thirty days from the date of such order or decision of a petition by any person aggrieved by the order or decision praying that the order or decision be modified or set aside in whole or in part, except that the court shall not consider such petition unless such person has exhausted the administrative remedies available under this Act. A copy of the petition shall forthwith be sent by registered or certified mail to the other party and to the Secretary or the Panel, and there-

upon the Secretary or the Panel shall certify and file in such court the record upon which the order or decision complained of was issued, as provided in section 2112 of title 28, United States Code.

(b) The court shall hear such petition on the record made before the Secretary or the Panel. The findings of the Secretary or the Panel, if supported by substantial evidence on the record considered as a whole, shall be conclusive. The court may affirm, vacate, or modify any order or decision or may remand the proceedings to the Secretary or the Panel for such further action as it may direct.

(c)(1) In the case of a proceeding to review any order or decision issued by the Secretary under this Act, except an order or decision pertaining to an order issued under section 104(a) of this title or an order or decision pertaining to a notice issued section 104(b) or (i) of this title, the court may, under such conditions as it may prescribe, grant such temporary relief as it deems appropriate pending final determination of the proceeding if—

(A) all parties to the proceeding have been notified and given an opportunity to be heard on a request for temporary relief;

(B) the person requesting such relief shows that there is a substantial likelihood that he will prevail on the merits of the final determination of the proceeding; and

(C) such relief will not adversely affect the health and safety of miners in the coal mine.

(2) In the case of a proceeding to review any order or decision issued by the Panel under this Act, the court may, under such conditions as it may prescribe, grant such temporary relief as it deems appropriate pending final determination of the proceeding if—

(A) all parties to the proceeding have been notified and given an opportunity to be heard on a request for temporary relief; and

(B) the person requesting such relief shows that there is a substantial likelihood that he will prevail on the merits of the final determination of the proceeding.

(d) The judgment of the court shall be subject to review only by the Supreme Court of the United States upon a writ of certiorari or certification as provided in section 1254 of title 28, United States Code.

(e) The commencement of a proceeding under this section shall not, unless specifically ordered by the court, operate as a stay of the order or decision of the Secretary or the Panel.

(f) Subject to the direction and control of the Attorney General, as provided in section 507(b) of title 28 of the United States Code, attorneys appointed by the Secretary may appear for and represent him in any proceeding instituted under this section.

Penalties

SEC. 109. (a)(1) The operator of a coal mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this Act, except the provisions of title 4, shall be assessed a civil penalty by the Secretary under paragraph (3) of this subsection which penalty shall not be more than $10,000 for each such violation. Each occurrence of a violation of a mandatory health or safety standard may constitute a separate offense. In determining the amount of the penalty, the Secretary shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of a violation.

(2) Any miner who willfully violates the mandatory safety standards relating to smoking or the carrying of smoking materials, matches, or lighters shall be subject to a civil penalty assessed by the Secretary under paragraph (3) of this subsection, which penalty shall not be more than $250 for each occurrence of such violation.

(3) A civil penalty shall be assessed by the Secretary only after the person charged with a violation under this Act has been given an opportunity for a public hearing and the Secretary has determined, by decision incorporating his findings of fact therein, that a violation did occur, and the amount of the penalty which is warranted, and incorporating, when appropriate, an order therein requiring that the penalty be paid. Where appropriate, the Secretary shall consolidate such hearings with other proceedings under section 105 of this title. Any hearing under this section shall be of record and shall be subject to section 554 of title 5 of the United States Code.

(4) If the person against whom a civil penalty is assessed fails to pay the penalty within the time prescribed in such order, the Secretary shall file a petition for enforcement of such order in any appropriate district court of the United States. The petition shall designate the person against whom the order is sought to be enforced as the respondent. A copy of the petition shall forthwith be sent by registered or certified mail to the respondent and to the representative of the miners in the affected mine or the operator, as the case may be, and thereupon the Secretary shall certify and file in such court the record upon which such order sought to be enforced was issued. The court shall have jurisdiction to enter a judgment enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order and decision of the Secretary or it may remand the proceedings to the Secretary for such further action as it may direct. The court shall consider and determine de novo all relevant issues, except issues of

fact which were or could have been litigated in review proceedings before a court of appeals under section 106 of this Act, and upon the request of the respondent, such issues of fact which are in dispute shall be submitted to a jury. On the basis of the jury's findings, the court shall determine the amount of the penalty to be imposed. Subject to the direction and control of the Attorney General, as provided in section 507(b) of title 28 of the United States Code, attorneys appointed by the Secretary may appear for and represent him in any action to enforce an order assessing civil penalties under this paragraph.

(b) Any operator who willfully violates a mandatory health or safety standard, or knowingly violates or fails or refuses to comply with an order issued under section 104 of this title, or any order incorporated in a final decision issued under this title, except an order incorporated in a decision under subsection (a) of this section or section 110(b)(2) of this title, shall, upon conviction, be punished by a fine of not more than $25,000, or by imprisonment for not more than one year, or by both, except that if the conviction is for a violation committed after the first conviction of such operator under this Act, punishment shall be by a fine of not more than $50,000, or by imprisonment for not more than five years, or by both.

(c) Whenever a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under this Act or any order incorporated in a final decision issued under this Act, except an order incorporated in a decision issued under subsection (a) of this section or section 110 (b)(2) of this title, any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (b) of this section.

(d) Whoever knowingly makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained pursuant to this Act or any order or decision issued under this Act shall, upon conviction, be punished by a fine of not more than $10,000, or by imprisonment for not more than six months, or by both.

(e) Whoever knowingly distributes, sells, offers for sale, introduces, or delivers in commerce any equipment for use in a coal mine, including, but not limited to, components and accessories of such equipment, which is represented as complying with the provisions of this Act, or with any specification or regulation of the Secretary applicable to such equipment, and which does not so comply, shall, upon conviction, be subject to the same fine and imprisonment that may be imposed upon a person under subsection (d) of this section.

IN THE

Supreme Court of the United States

October Term, 1976

No. 76-40

BITUMINOUS COAL OPERATORS' ASSOCIATION, INC. and ZEIGLER COAL COMPANY,

Petitioners,

v.

THOMAS S. KLEPPE, Secretary of the Interior, and INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA,

Respondents

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF IN OPPOSITION FOR RESPONDENT INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA

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OPINIONS BELOW

The decision of the Court of Appeals (per Tamm, J., joined by Wright and McGowan, JJ.) is reported at 532 F.2d 1403. The Court of Appeals vacated a decision of the Interior Board of Mine Operations Appeals which is reported at 81 I.D. 729 and 3 IBMA 448, and is set out in the Court of Appeals appendix at 125-139. The Interior

Board opinion reproduced in the appendix to the petition (P. 11a-30a),[1] which is reported at 82 I.D. 221 and 4 IBMA 139, is only a clarification of the Board's decision, as the Board states (P. 12a). The Board's decision reversed an earlier unreported decision of an Interior Department administrative law judge which is set out in the Court of Appeals appendix at 113-118.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals properly construed Section 104(c)(1) of the Federal Coal Mine Health and Safety Act, 30 U.S.C. § 814(c)(1), as authorizing federal mine inspectors to order coal mine operators to withdraw their personnel from "affected areas" of their mines pending abatement of violations of federal health or safety standards, where the operator has first received a warning notice for a violation of a standard resulting from the operator's "unwarrantable failure" to comply with the standards, and an inspector thereafter, within 90 days, finds another violation likewise resulting from the operator's "unwarrantable failure?"

2. As so construed, does § 814(c)(1) deny mine operators due process of law?

STATEMENT OF THE CASE

The Factual Background

The events leading to this litigation began on April 28, 1972, when a federal mine inspector[2] issued a warning notice to petitioner Zeigler pursuant to 30 U.S.C. § 814(c)(1), finding that an accumulation of loose coal and coal dust

[1] "P" is used herein to refer to the certiorari petition and the appendix to it. "A" refers to the Court of Appeals appendix.

[2] Section 505 of the Coal Act, 30 U.S.C. §954, sets minimum qualifications designed to insure the expertise of federal mine inspectors. Zeigler has stipulated to the expertise of the inspector in this case, who was a veteran of 40 years in the mining industry.

in Zeigler's No. 4 Mine amounted to a violation of the federal mine safety standard set out at 30 CFR § 75.400, that the violation was due to Zeigler's "unwarrantable failure" to comply with federal safety regulations, and that the violation was one which could significantly and substantially contribute to the cause and effect of a mine safety hazard. See 30 U.S.C. § 814(c)(1).

A subsequent inspection of the same mine on May 11, 1972, resulted in the issuance of the § 814(c)(1) withdrawal order (A. 106) here at issue when the inspector found another violation of 30 CFR § 75.400, found that it too had resulted from Zeigler's "unwarrantable failure," and found that it had "affected" an area of the mine which was described on the face of the order.[3] The order was terminated 13 hours later, when the inspector found that the violation had been abated.

The Administrative Law Judge's Decision

On June 5, 1972, Zeigler filed a request for administrative review of the inspector's order pursuant to 30 U.S.C. § 815. Respondent United Mine Workers of America (UMWA) intervened and after a public hearing, the administrative law judge denied Zeigler's application. The administrative law judge found that contrary to Zeigler's assertions, Zeigler had been in violation of 30 CFR § 75.400, and that its violation had been caused by Zeigler's "unwarrantable failure" to comply with that regulation. (A. 116) In addition, the administrative law judge rejected as contrary to the plain words of the statute Zeigler's contention that he should construe the statute as requiring that a violation resulting in issuance of a § 814(c)(1) order, like that resulting in a § 814(c)(1) notice, be one which "could significantly and

[3] Section 814(c)(1) requires the withdrawal of miners from "affected" areas—areas where safety levels have been reduced by an unwarrantable failure violation occurring within 90 days after issuance of a §814(c)(1) warning notice—pending the violation's abatement.

substantially contribute to the cause and effect of a mine safety or health hazard." (A.118) He thereby followed the decision of the Interior Board of Mine Operations Appeals in *UMWA* v. *Clinchfield Coal Co.*, 78 I.D. 158, 1 IBMA 31 (1971).

The inspector had testified that the cited violation was one meeting the "could" contribute to creation of a hazard requirement anyway (A. 93):

"Q. Did the violation, you found, admitted, substantially and significantly contribute to the cause and effect of a mine safety or health hazard?

"A. It could have.

"Q. [B]ut did it?

"A. Not at that time.

"Q. Why not.

"A. Because nothing at that time had happened. We had to correct the condition before something did happen, which could be expected to happen."

The Decision Of The Board Of Mine Operations Appeals

Following the initial rejection of its application for review, Zeigler filed an administrative appeal to the Board of Mine Operations Appeals, in which the Bituminous Coal Operators' Association (BCOA) intervened. The Board reversed the administrative law judge and granted the application, holding not only that the "could contribute" requirement set out in the warning notice portion of § 814(c)(1) should be carried forward by implication to the withdrawal order portion (A. 177-78), but also that the "could contribute" requirement should be administratively rewritten so as to limit the issuance of § 814(c)(1) orders to situations where the second unwarrantable failure violation poses "a probable risk of serious bodily harm or death"[4] (A. 138). The Board found that the cited violation did not meet its new "probable death" test, holding that the above-quoted testimony of the inspector established that the violation "did not pose a grave threat to life and limb."[5] (A. 138).

The Board's interpretation of § 814(c)(1) merely reiterated a new interpretation it had announced a few weeks earlier, after the administrative law judge's decision herein, in *Eastern Associated Coal Corp.*, 81 I.D. 567, 3 IBMA 331 (1974) (set out at A. 177-206). The Board acknowledged its reliance upon *Eastern*, stating that following *Eastern* "would effectuate the Congressional purposes as we [understand] them." (A. 137)

The Board reconsidered its decision after the UMWA filed a petition for review in the Court of Appeals, but did not change its holding. On reconsideration, the Board stated that it felt justified in engaging in an extended exercise in statutory construction because it had found the statutory language "ambiguous" (P. 23a) and the legislative history "unilluminating" (P. 26a).

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[4] Thereby excluded from the scope of §814(c)(1) were violations posing a 49 per cent or less risk of serious bodily harm or death, violations posing a probable risk of less than serious injury, etc.

[5] In a subsequent proceeding to determine the amount of the civil penalty to be assessed under 30 U.S.C. §819(a) for the cited violation, the Board expressly held that the violation was, in the Board's own words, "serious." *Zeigler Coal Co.*, 5 IBMA 338, 344 (1975).

The economic loss Zeigler suffered because of the withdrawal order was given "consideration" in determining the amount of the penalty assessment (compare P. 5, 1. 14-15), since the Board's decision vacating the inspector's order had not yet been set aside at the time the Board entered its assessment order. *Id.* at 343.

A civil penalty was due despite the fact that the Board had vacated the §814(c)(1) order. The order had not been vacated because of the absence of a violation, but only because the violation—though "serious"—was not one posing "a grave threat to life and limb."

The Court Of Appeals Decision

The Court of Appeals reversed, finding that "[t]he statute and legislative history are clear" (P. 8a), and that the "could contribute" language only describes a prerequisite to the issuance of §814(c)(1) notices, not §814(c)(1) orders. Because of its holding the Court did not reach the UMWA's alternative contention that the Board had misconstrued the "could contribute" language, and that the instant violation was one which "could contribute" if that language had been properly interpreted.[6]

REASONS FOR DENYING THE WRIT

I. THERE IS NO CONFLICT OF DECISION.

As the petition itself makes clear, the decision of the Court of Appeals is not in conflict with any decision of this Court or any Court of Appeals. Petitioners at most allege a conflict in principle. The *decision* below obviously does not conflict with any decision of this Court, as this Court has never had occasion to interpret or otherwise deal with 30 U.S.C. §814(c)(1). And the decision below is entirely consistent with the only possibly relevant decision of another Court of Appeals. In *Sink* v. *Morton,* 529 F.2d 601, 604 (1975), the Fourth Circuit held that mine operators are *not* denied due process when §814(c) orders are issued to them without a prior hearing.

II. THE DECISION OF THE COURT OF APPEALS IS CORRECT.

In essence, the petition for certiorari argues that the decision of the Court of Appeals is wrong in light of general principles of statutory construction. That assertion, however, even if correct, is plainly insufficient to invoke certiorari review. It is also incorrect.

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[6] See UMWA D.C. Cir. Brief at 34-36 and UMWA D.C. Cir. Reply Brief at 17-18.

In the first place, it is easy to dispose of the petitioners' complaint that the Court of Appeals "ignored without discussion" the constitutional "argument" that they had supposedly presented to it. (P. 6) Petitioners' entire constitutional "argument" to the Court of Appeals consisted of a four-line footnote buried near the end of their brief, which stated *in toto:*

> "13. The Department's construction avoids serious constitutional issues which otherwise would emerge, in the event *ex parte* closure orders were issued based on violations which pose no substantial health or safety hazard to the miners. *Fuentes* v. *Shevin,* 407 U.S. 67 (1972)."

The petitioners did not cite any of the other decisions now cited at pp. 9-11 of the Petition, nor did the petitioners mention anything about due process or possible constitutional violations at oral argument. Small wonder that the Court of Appeals saw no need to mention petitioners' constitutional "argument" after rejecting it!

Furthermore, petitioners clearly were well advised when they elected not to advance their constitutional contentions in the Court of Appeals, since those contentions are meritless. As the *Sink (supra)* decision and 30 U.S.C. §815 make clear, massive procedural safeguards surround the issuance of §814(c)(1) withdrawal orders.. And it must be remembered that such orders can only be issued when a safety expert with the qualifications outlined in 30 U.S.C. §954 has first issued a warning notice and then found another "unwarrantable" safety violation, that such orders only close down areas of coal mines "affected" by the violation, and that such orders are terminated once the violation has been abated. As the petitioners' Court of Appeals brief admits (at 15), "[t]he conditions giving rise to the order generally are promptly remedied."

Petitioners would only add that the Court of Appeals interpretation of §814(c)(1) is obviously correct. The legislative history cited in Judge Tamm's Court of Appeals opin-

ion (P. 5a-8a) is clear, and so is the statutory language. The Court of Appeals interpretation promotes increased mine safety, and thus promotes the very purpose of the Act, as the Court of Appeals found. (P. 5a-6a) In short, the Court of Appeals is entirely right.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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